(2)

No. 89-1707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VINCENT JAMES LANDANO,

Petitioner,

v.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, and IRWIN I. KIMMELMAN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rule of comity which serves as the basis for the exhaustion doctrine in 28 *U.S.C.* sec. 2254 is violated by a habeas petitioner presenting to the federal district court newly discovered evidence which significantly alters the posture of the case and the claim asserted without giving the state courts the initial opportunity to review and analyze the evidence?

2. Whether a habeas petitioner is entitled to circumvent the exhaustion requirement of 28 *U.S.C.* sec. 2254 by asserting in a *Brady* claim that the prosecutors allegedly acted in bad faith thereby denying state courts the initial opportunity to review claims of constitutional error?

3. Whether a supplemental jury charge delivered after a short period of deliberation in a lengthy state court trial, which did not focus on the minority jurors but instead told the jurors that they should not reach a verdict unless they could do so without surrendering or sacrificing their conscientious scruples or personal convictions, was unconstitutionally coercive?

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COUNTER-STATEMENT OF THE CASE

The Trial

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearny, New Jersey. (App. 8). During the robbery, one of the perpetrators shot and killed Newark Police Officer John Snow. (App. 8). Hudson County Indictment No. 73-76 charged petitioner Landano and three other men, Allan Roller, Victor Forni and Bruce Reen, with felony murder and other crimes stemming from the robbery. (App. 8). The trial of Forni and Reen was severed

from that of Landano and Roller.[1] Prior to the commencement of the Landano and Roller trial, and pursuant to a plea agreement with the prosecutor, Roller pled *non vult* to the felony murder charge and testified against Landano. (App. 8).

The following evidence was adduced at Landano's trial. In 1976 Allan Roller, the president of the Breed motorcycle gang, and Victor Forni, a non-gang associate of Roller's described as the organizer of gang criminal activity, recruited David Clyburn to carry out armed robberies in the metropolitan area, including a conspiracy to rob the Hi-Way Check Cashing facility located in a trailer on Jacobus Avenue in Kearny, New Jersey. (Ja97, Ja144).[2] Forni planned the crime and supplied the weapons, while Roller and Clyburn were to execute the robbery. (Ja4). Normally, Forni or other Breed members would be stationed near such designated robbery targets to serve as backup. After participating in a dry run, Clyburn decided to withdraw because he was apprehensive about his confederates. (Ja97, Ja144-145). As a replacement, Forni recruited his friend Landano on August 11, 1976, and Roller and Forni showed Landano the target area the following day. (Ja98, Ja145). At about 7:30 a.m. on August 13, 1976, Forni, Roller and Landano set out from Staten Island for South Kearny. (Ja98, Ja145-146). Forni helped steal a car for perpetrating the crime, supplied coffee, and then returned to New York, while Landano and Roller waited for the check

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[1] Forni and Reen were tried for these offenses in 1978 and were convicted of conspiracy to commit armed robbery but acquitted of the murder and other charges.

[2] Ja refers to the Joint Appendix filed in this case with the Court of Appeals for the Third Circuit.

cashing establishment to open. (Ja98, Ja146). At about 9:20 a.m. Roller and Landano approached the trailer; Landano attempted to enter the trailer door, while Roller went to the window, displayed a handgun, and demanded admittance. (Ja146-147).

Seeing Roller brandishing a gun, the proprietor, Jacob Roth, activated the silent alarm and yelled for his son Jonathan and a customer, John DeMaritz, both of whom were inside, to "hit the deck." (Ja147). Landano, meanwhile, had left the trailer area and proceeded to a van parked in the lot and occupied by Colin McCormick, who had just cashed his check and was counting his money. (Ja99, Ja146). Pushing the barrel of his gun into McCormick's side, Landano demanded McCormick's money and, after observing Newark Police Officer John Snow arriving in a marked police car, instructed McCormick[3] to lie on the floor of the van. (Ja146-147).

Roller entered the trailer and secured the cash drawer, which contained $7,000. (Ja147). Almost simultaneously, Landano ran toward the police car, raised the gun over his head, then levelled it and fired. (Ja148). The bullet struck Officer Snow in the neck, severing an artery and precipitating a great loss of blood. Not forgetting his purpose, however, Landano reached into the patrol car and over the dying police officer to secure an attache case which contained $46,000. (Ja148).

Joseph Pascuiti, an employee of an adjacent warehouse, observed a dark-haired man run towards the police car and point a gun at the police officer. (Ja228-

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[3] McCormick described his attacker as a tall, thin man with broad shoulders and dark hair. (Ja146).

230). When Pascuiti turned to summon help, he heard several gunshots. (Ja148, Ja230). He described the gunman as "built-up in the shoulders," with dark curly hair and wearing a colored jacket. (Ja148; Ja229). Pascuiti also testified that the gunman was the driver of the getaway car. (Ja234, Ja240-241).

Landano and Roller reached the stolen getaway car and sped from the lot, where Landano informed Roller that he had to "ice [or waste] the cop." (Ja99). Jacob Roth made note of the license plate number of the getaway car, SRU 329. (Ja101, Ja148). Behind the wheel, Landano drove frantically in an effort to weave through a truck traffic jam.

Raymond Portas, a truck driver caught in the traffic jam through which the getaway vehicle maneuvered, observed the occupants of that vehicle. (Ja101, Ja148). He positively identified Landano as the driver. (Ja101, Ja149). He also noted the license plate number of the car, SRU 329. (Ja101, Ja148).

Landano missed the Skyway entrance and ultimately came to rest at the waterfront. They abandoned the vehicle, discarded their weapons and separated. (Ja99, Ja149). Later that day Landano shaved off his mustache and met Roller and Forni in Staten Island to divide the proceeds. (Ja100).

A blood-stained hat, recovered from the abandoned getaway vehicle, was linked to Landano, who had been photographed wearing such a hat on several occasions. (Ja100, Ja149-150). Strands of hair found in the hat were similar to Landano's hair. (Ja150). Allan Roller was apprehended in Denver and recounted Landano's involvement in the robbery and murder. (Ja98-100). Clyburn was apprehended on an-

other charge and implicated Forni, Roller and Reen. (Ja144-145). Jacob and Jonathan Roth identified Landano as the dark-haired perpetrator (Ja101, Ja147), and Portas identified him as the driver of the getaway car. (Ja101).

Landano's trial lasted approximately 19 days. The jury began its deliberations on Friday, May 13, 1977 at approximately 11:50 a.m. (Trans. 5/13/77, p.86). Soon thereafter, the jury requested that the testimony of three witnesses be reread. (Trans. 5/13/77, p.87). The court was unable to secure the requested testimony at that time and informed the jury that the testimony would be reread on Monday. The jury then went home at approximately 5:00 p.m. (Trans. 5/13/77, pp.90-94).

On Monday, May 16, 1977, the testimony of the requested witnesses was read to the jury. This process consumed the entire morning. (Trans. 5/16/77, pp. 3-6). The jury resumed deliberations at 12:15 p.m. and returned with a request for additional information at 4:25 p.m. (Trans. 5/16/77, p. 6). The jury's question was answered and they went home for the evening. (Trans. 5/16/77, pp. 6-9).

The following morning, at approximately 10:00 a.m., the jury foreman sent the judge a note indicating that the jury was unable to reach a verdict. The trial judge gave the following supplemental instruction to the jury:

> Ladies and gentlemen, we are in the fifth week of this trial. And I think you realize what is invested as far as time, money and everything else.

You have now informed the Court of your inability to reach any verdict in this case. As I've indicated to you several times, the Court does not wish to know, and you're not to indicate in any way how you stand or whether you personally entertain a predominant view. That's your business.

But, at the outset this Court wishes you to know that although you have a duty to reach a verdict, if that's possible, the Court has neither the power nor the desire to compel an agreement upon a verdict.

Now, the purpose of these remarks is to point out to you members of the jury the importance and desirability of reaching a verdict in this case, provided, however, that you as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions.

You will recall that upon assuming your duties in this case each of you took an oath. That oath places upon each of you as individuals the responsibility of arriving at a true verdict upon the basis of your own opinion and not merely upon acquiescence in the conclusions of your fellow jurors.

However, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to reach a verdict by a comparison of views and by a consideration of the proofs with your fellow jurors.

> During your deliberations you should be open-minded and consider the issues with proper deference to and respect for the opinions of each other and you should not hesitate to re-examine your own views in the light of such discussions.
>
> You should consider also, and I'd like you to pay close attention to this, that this case at a future time must be decided; that you're selected in the same manner and from the same source from which any future jury must be selected. There's no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial or more competent to decide it; or that more or clearer evidence will ever be produced on one side or the other.
>
> Having said that, and saying it forcefully to you, ladies and gentlemen, I ask you to retire once again to the jury room and invest more time in the case as is necessary for further deliberations upon the issues submitted for your determination and see what you come up with, please. Thank you.
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> [Trans. 5/17/77, pp.2-4].

The jury resumed deliberations at 10:17 a.m., and returned with a verdict at 11:10 a.m. (Trans. 5/17/77, p.4). Landano was convicted of felony murder and the other charged offenses.

Petitioner's First Post-Conviction Proceeding (1978).

While petitioner's direct appeal was pending, he filed a motion with the Appellate Division seeking a

remand to the trial court for determination of a motion for a new trial based on newly discovered evidence. A remand was granted and evidentiary hearings were thereafter conducted in the trial court on November 21, 22 and 27, 1978.

Among other things, petitioner maintained that the Hudson County Prosecutor's Office had failed to disclose the fact that Roller was suspect in certain other robberies that had been committed in Perth Amboy. Although the trial prosecutor had apparently been unaware of the fact,[4] Lieutenant Farley of the homicide squad had been contacted in late August 1976 by Perth Amboy authorities seeking to arrange a lineup with Roller, Forni, Reen and gang member William Farullo. At that time, however, Forni and Reen were confined in New York and contesting extradition. The lineup was therefore postponed until all four suspects could be assembled together in New Jersey.

During subsequent discussions, Lieutenant Farley requested the Perth Amboy authorities not to publicize their investigation in order either to prevent alerting the suspects of the need to concoct an alibi [according to Farley] or to aid in plea bargaining negotiations [according to Perth Amboy Detective Manuel Cruz]. When the suspects were still unavailable in mid-November 1976, contacts between the two authorities were suspended. They were not to resume

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[4] The trial prosecutor noted that he had anticipated that Roller would go to trial [Roller did not enter his plea until the day before the trial]; accordingly, the prosecutor would have been anxious to have information tying Roller to another crime purportedly similar to the Hi-Way Checking offense for possible use under *N.J. Evid. R.* 55.

until March 1978. No charges were ever preferred against Roller by Perth Amboy authorities.

On December 1, 1978, Judge Walsh rendered a comprehensive forty-seven page opinion which denied the new trial motion. (Ja94-140). The court reviewed the evidence at trial highlighting the quality of the proofs adduced by the prosecution wholly apart from the testimony of Allan Roller. The court thereupon concluded that the evidence against defendant had been overwhelming and that no verdict other than guilty had been possible. Notwithstanding its view of the proofs, the court carefully considered each of the asserted bases for relief and also whether the cumulative effect of the matters brought to its attention had undermined the essential fairness of petitioner's trial. Upon due consideration, the motion for a new trial was denied in all respects.

Thereafter, on March 21, 1980, the Superior Court of New Jersey, Appellate Division, denied petitioner's consolidated appeals from his conviction and the denial of his new trial motion. (Ja141-157). The Supreme Court of New Jersey denied certification on July 8, 1980. *State v. Landano*, 85 *N.J.* 98, 425 *A.*2d 263 (1980).

Petitioner's Second Post-Conviction Proceeding (1982).

In 1982, petitioner filed a petition for post-conviction relief in the state trial court. Petitioner attempts to demonstrate in his statement of facts before this Court that the claims he is now raising before this Court were raised in his 1982 post-conviction relief proceeding. In this regard petitioner relies upon the "Preliminary Statement" to his brief in support of his motion for post-conviction relief (Ja30-31, Ja397-

399) and the section of his petition for certification to the Supreme Court of New Jersey where he set forth the "Reasons Why Certification Should be Allowed" (Ja31, Ja551) in support of his claim that the grounds he now advances were raised in the state courts. (Pet. at 11-16). However, an examination of Landano's state court pleadings reveals no mention of the specific factual claims later raised in the 1989 habeas proceeding in the district court. Landano simply asserted, in general terms, that the State suppressed evidence that incriminated Forni and allegedly fabricated evidence inculpatory of himself. The fact that it was Landano's general theory that Forni was the actual killer of Officer Snow did not satisfy, for exhaustion purposes, the factual issues he raised for the first time in the district court.

An examination of the pleadings filed by Landano in the state courts clearly demonstrates that his claims with respect to prosecutorial misconduct focused exclusively on the Portas and Roth identifications and the evidence of Roller's other crimes. (Ja397-422; Ja433-443; Ja463-588). Landano's Memorandum In Opposition to the State's Motion to Dismiss the Petition for Post-Conviction Relief indicates that the issues raised as a basis for post-conviction relief were: 1) Portas' recantation; 2) criminal investigation of Jacob Roth; 3) the Mulcahy tape; 4) possible involvement of Officer Snow's son in the crime, and 5) the *Allen*[5] charge issue. (Ja412-421). Judge Hanrahan's letter opinion of July 13, 1982, confirms that these five issues were the only ones raised in the petition. (Ja158-160). The trial court denied relief on the issues

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[5] *Allen v. United States*, 164 *U.S.* 492 (1896).

relating to the Roth identification, the *Allen* charge, the Mulcahy tape, and Officer Snow's son, but granted an evidentiary hearing on the Portas recantation. (Ja158-162).

In a motion dated September 1, 1982, Landano sought to expand the scope of the evidentiary hearing to include the Jacob Roth identification issue. (Ja422-424). Landano also sought discovery of all files and documents containing references to the Portas and Roth identifications, and to take a deposition of Thomas M. Mulcahy. (Ja422-450). In a letter opinion dated September 27, 1982, Judge Hanrahan denied Landano's motion to expand the scope of the evidentiary hearing and for discovery on the Roth and Mulcahy issues. (Ja163). Landano did receive discovery on the Portas issue and subpoenaed several documents from the State which included the Portas statement of April 15, 1977, a supplementary investigation report, dated August 19, 1976, a three page list of exhibits, photographs, and other statements by Portas. (Ja451-462).

The state court conducted several days of evidentiary hearings on the Portas recantation, and petitioner was permitted to fully present testimony relevant to his contention that Portas' identification of him was the product of suggestive prosecutorial procedures. The testimony given by Portas at the hearing was completely contrary to Portas' trial testimony and to the testimony of the state investigator who conducted the photo identification. At this hearing Portas recalled that he testified only once before—at petitioner's trial, despite the fact that Portas actually testified three times—at the pre-trial identification hearing, at petitioner's trial and at the

codefendants' trial. On each of these occasions, Portas identified Landano as the driver of the get-away car. The state trial judge found that Portas' testimony was not credible and that his partial recantation was not believable.

In his brief to the Superior Court of New Jersey, Appellate Division, Landano raised seven issues relating to the post-conviction relief proceedings. (Ja463-521). He raised two issues with respect to prosecutorial misconduct (Points IV and VII), but they focused solely on the statement of a Mr. Kaiser and a general claim of prosecutorial misconduct regarding the Roth and Portas identifications. (Ja463-521). The Appellate Division affirmed the decision of the trial court. Landano raised the same issues in his Petition for Certification to the Supreme Court of New Jersey, which denied certification in this case. (Ja542-569). These are the same issues that Landano raised before the district court and the Third Circuit Court of Appeals in his 1985 habeas proceeding. *Landano v. Rafferty*, 670 *F. Supp.* 570, 573 (D.N.J. 1987), reconsideration denied, 675 *F. Supp.* 204 (D.N.J. 1987), aff'd 856 *F.*2d 569 (3d Cir. 1988), *cert.* den. 109 *S.Ct.* 1127 (1989). Landano never raised in the state courts or in the 1985 habeas proceeding any claims with respect to the Pasapas and Calabrese identifications, or any "negative" identification by Pascuiti. Landano's identification claims in the state courts focused solely on Portas and Roth. The *Brady* claims that petitioner now raises before this Court were presented for the first time in the 1989 habeas action in the district court and were never raised in the state courts.

The court of appeals found that petitioner's preliminary statement to his post-conviction relief brief did not raise the *Brady* claims he later advanced in the district court. (App. 25-29). The court of appeals also examined petitioner's state court pleadings and the legal arguments advanced and determined that the factual bases for the current *Brady* claims were never raised in the state courts and thus were not exhausted. (App. 23-32).

The 1985 Habeas Petition

On October 10, 1985, Landano filed a petition for habeas corpus relief with the United States District Court of New Jersey. Landano raised the following grounds for relief:

> (1) that his due process rights to a fair trial were infringed by the admission of Raymond Portas' identification testimony; (2) that the state unlawfully suppressed exculpatory and material evidence that would have impeached the testimony of codefendant Allen Roller; (3) that the state unlawfully suppressed exculpatory and material evidence that would have impeached the testimony of Jacob Roth, victim of the armed robbery; and (4) that the state court's coercive charge to the jury violated the petitioner's Sixth Amendment right to an impartial jury.
>
> [App. 145, footnote omitted].

The district court held an evidentiary hearing at which Portas alone testified,, although the State was not permitted to question him. The district court made factual findings contrary to those reached by the state court and determined that Portas was a credible wit-

ness. (App. 158-171). The district court recognized, however, that 28 *U.S.C.* sec. 2254(d) established a presumption of correctness for the factual findings of the state court that "Portas' recantation testimony was incredible and 'untrustworthy' " (App. 163), and thus it was bound by those findings. (App. 163-171).

In an opinion dated September 29, 1987, the district court denied habeas corpus relief, *Landano v. Rafferty*, 670 *F.*2d 570 (D.N.J. 1987) (App. 139-189), and on December 22, 1987, Landano's motion for reconsideration was denied. *Landano v Rafferty*, 675 *F. Supp.* 204 (D.N.J. 1987). The Third Circuit affirmed the denial of the habeas petition, *Landano v. Rafferty*, 856 *F.*2d 565 (3d Cir. 1988), and this Court subsequently denied *certiorari* on February 21, 1989. *Landano v. Rafferty*, 109 *S.Ct.* 1127 (1989).

The 1989 Habeas Petition

Subsequent to this Court's denial of *certiorari*, Landano discovered in the file of a codefendant, a Kearny Police Continuation report which he claims he did not receive in discovery. This report contains an identification made by a Joseph Pasapas in which he stated that codefendant Victor Forni resembled the driver of the get-away car. Rather than pursuing this new and unexhausted factual claim in the state courts where it correctly should have been raised, Landano instead obtained an *ex parte* order from the district court seizing all the police and prosecution files in this matter.

Landano's current attorneys, who did not represent him at trial, reviewed the state's files and found several items that they alleged were not given in discovery at the time of his trial. These items included:

1) Kearny Police Continuation Report dated January 19, 1977, prepared by Detective Edward Rose, which states that a Joseph Pasapas picked out a picture of Forni as resembling the man who drove the get-away car; 2) envelope found in the Kearny Police file that had handwritten on it "Forni looks like guy who was driving down street," 3) an undated and unsigned handwritten document with "Id. on Landano" written on top of the page with a list of witnesses and notations next to the names. Landano claimed that this particular document supported an inference that these witnesses were shown a single photograph of him and had eliminated him as the perpetrator of the offense.

The State asserted the exhaustion defense in the district court on the grounds that these particular documents and the specific factual claims raised by Landano were never presented to the state courts. The State disputed that any suppression occurred in this case and presented compelling evidence that the information in the Kearny Police report was known to Landano and was elicited at his trial. The State also argued that the "Id. on Landano" handwritten document did not demonstrate that a single photograph was shown to any witness in this case, nor did it indicate that Landano was eliminated as the perpetrator of this murder. Despite the obvious exhaustion problems and factual disputes, the Honorable H. Lee Sarokin, U.S.D.J., determined that an evidentiary hearing was not warranted and granted the conditional writ of habeas corpus. (App. 76-138).[6]

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[6] Landano quotes at length from the portion of the district court opinion that discussed the alleged bad faith of the prosecution. The State has consistently and strenuously disputed the

The State appealed to the Court of Appeals for the Third Circuit which reversed the judgment of the district court and directed the district court to vacate the order granting the writ of habeas corpus and dismiss Landano's petition. (App. 38). The Third Circuit found that Landano had not exhausted state remedies and noted that "Landano concedes that none of the suppression claims he previously raised in his initial habeas petition specifically included the information he now claims was suppressed, *i.e.*, the information contained in the 'Id. on Landano' document and the Kearny Police Continuation Report." (App. 23). The Third Circuit also recognized that the State's argument on non-suppression "as well as on other issues relating to the merits of Landano's claims, is not insubstantial." (App. 30 n.16).

The Honorable Max Rosenn, U.S.C.J., dissented from the majority opinion. (App. 39-68). On April 3, 1990, Landano's petition for rehearing was denied by the Third Circuit. (App. 69-71).

REASONS FOR DENYING THE WRIT

POINT I

THE THIRD CIRCUIT COURT OF APPEALS APPLIED THE RULE OF EXHAUSTION FORMULATED BY THIS COURT AND THE OTHER CIRCUIT COURTS IN REQUIRING LANDANO TO PRESENT NEWLY DISCOVERED DOCUMENTS WHICH FORMED THE BASIS OF HIS HABEAS CLAIM TO THE STATE COURTS FOR REVIEW.

In an attempt to entice this Court to grant a writ of *certiorari*, Landano asserts that the opinion of the

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claim that the prosecution engaged in a bad faith pattern of suppression in this litigation. (See Point II, *infra*).

Third Circuit Court of Appeals on Landano's need to exhaust in state court his claims, based upon newly discovered evidence, contradicts the holdings of another circuit court, thereby creating a conflict within the federal courts which should be resolved by this Court. This assertion is incorrect. The Third Circuit Court of Appeals in this case applied the rule of exhaustion formulated by this Court and followed by other circuits in requiring Landano to return to state court to present the newly discovered documents which he claimed warranted habeas relief. For that reason, the petition for a writ of *certiorari* should be denied.

When Landano sought to reopen his previous habeas petition under *Fed. R. Civ. Proc.* 60(b), he presented to the district court a Kearny, New Jersey, police department continuation report which he purportedly never had received in discovery in state court and had obtained from the file of a codefendant's attorney. (App. at 15). He also sought and obtained an *ex parte* order to seize files belonging to the Hudson County Prosecutor's Office, the New Jersey Attorney General's Office and several police departments dealing with the case. In the Hudson County Prosecutor's file, Landano retrieved a handwritten sheet of paper labeled "ID. on Landano." (App. at 16-17). The district court found, without holding an evidentiary hearing, that these documents were indeed suppressed by the prosecution and determined that a conditional writ of habeas corpus should be granted. (App. at 17-19). This decision was reversed by the Third Circuit on exhaustion grounds.

As this Court consistently has ruled, a state prisoner must exhaust available state remedies before

seeking redress in the federal courts. *Granberry v. Greer*, 481 *U.S.* 129, 133-134 (1987); *Duckworth v. Serrano*, 454 *U.S.* 1, 3 (1981); *Picard v. Connor*, 404 *U.S.* 270, 275 (1971). This requirement applies even when the relief is sought under *Fed. R. Civ. Proc.* 60(b). *Pitchess v. Davis*, 421 *U.S.* 482, 489 (1975). The doctrine is not jurisdictional but reflects a policy of federal-state comity, *Rose v. Lundy*, 455 *U.S.* 509, 515, 516 (1982), and "serves to minimize friction between our federal and state systems of justice by allowing the state an initial opportunity to pass upon and correct alleged violations of constitutional rights." *Duckworth v. Serrano*, 454 *U.S.* at 3; *Picard v. Connor*, 404 *U.S.* at 275. An exception to the rule is made only if there is no opportunity to obtain redress in state court or if the state corrective process is so deficient as to render any attempt to seek relief in the state court futile. *Duckworth v. Serrano*, 454 *U.S.* at 3; *Wilwording v. Swenson*, 404 *U.S.* 249, 250 (1971).

A petitioner exhausts state remedies by fairly presenting the claim raised in federal court to the highest court in the state. The claim raised in federal court must be the substantial equivalent of that presented to the state court. *Picard v. Connor*, 404 *U.S.* at 275, 278. This requirement requires the petitioner to present the state court with both the factual and legal premise presented in state court. *Gibson v. Scheidemantel*, 805 *F.*2d 135, 138 (3d Cir. 1986). When, as in this case, documents submitted to the federal court were never presented to the state courts and place the case in a significantly different posture than when the state courts initially considered it, the federal courts of appeal uniformly hold that the petitioner

must return to the state court and exhaust state remedies. See, *e.g.*, *Dispensa v. Lynaugh*, 847 *F.*2d 211, 217 (5th Cir. 1988); *Wise v. Warden, Maryland Penitentiary*, 839 *F.*2d 1030, 1033 (4th Cir. 1988); *Sampson v. Love*, 782 *F.*2d 53, 55-56 (6th Cir. 1986), *cert.* den. 479 *U.S.* 844 (1986); *Davis v. Wyrick*, 766 *F.*2d 1197, 1204-1205 (8th Cir. 1985), *cert.* den. 475 *U.S.* 1020 (1986); *Stranghoener v. Black*, 720 *F.*2d 1005, 1007-1008 (8th Cir. 1983); *Matias v. Oshiro*, 683 *F.*2d 318, 320 (9th Cir. 1982); *Jones v. Hess*, 681 *F.*2d 688, 693-694 (10th Cir. 1982); *Domainque v. Butterworth*, 641 *F.*2d 8, 13 (1st Cir. 1981); *United States v. Figueroa*, 411 *F.*2d 915, 916 (2d Cir. 1969). See also *Stevens v. Zant*, 580 *F.Supp.* 323, 325 (S.D. Ga. 1984). *Cf. Vasquez v. Hillery*, 474 *U.S.* 254, 258 (1986) (request by district court for additional documentary evidence which did not alter legal claim already presented to state courts did not undermine policies of exhaustion).

That is all that the Third Circuit Court of Appeals has ordered in this case. It recognized that general allegations of error based upon suppression of evidence, so-called "*Brady*"[7] claims are not exempted from the exhaustion doctrine's requirement that the petitioner provide the state court with the factual predicate upon which the specific claim is based. See also *Lanigan v. Maloney*, 853 *F.*2d 40, 45 (1st Cir. 1988), *cert.* den. 109 *S.Ct.* 788 (1989) (some claims of constitutional violations encompass such a broad scope that petitioner must specify exactly how rights were violated in state court and petitioner cannot change factual predicate in federal court without running

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[7] *Brady v. Maryland*, 373 *U.S.* 83 (1963).

afoul of exhaustion doctrine). Because questions of materiality rely in large part upon what evidence was suppressed and its impact upon the verdict, *United States v. Bagley*, 473 *U.S.* 667, 682 (1985), a state court not presented with the new factual material could not have engaged in the type of analysis *Brady-Bagley* requires and therefore, exhaustion has not been achieved. (App. at 23-24).

Landano argues that the Third Circuit decision is in conflict with the decision of *Austin v. Swenson*, 522 *F.*2d 168 (8th Cir. 1975), aff'd after remand, 538 *F.*2d 443 (8th Cir. 1976). That argument is unpersuasive for several reasons. First, in *Austin*, the federal district court had held an evidentiary hearing and then dismissed the habeas petition on exhaustion grounds. The Eighth Circuit Court of Appeals reversed, holding that a second hearing in state court, in a case in which the State had conceded exhaustion, was a waste of judicial resources. 522 *F.*2d at 170. Second, the Eighth Circuit itself in *Stranghoener v. Black*, *supra*, has adopted the uniform rule of the circuits that requires return to state court when new facts are presented in federal court. Third, the Eighth Circuit applied the rationale of the *Landano* court in *Eaton v. Wyrick*, 528 *F.*2d 477 (8th Cir. 1975) in which it held that a *Brady* claim that exculpatory fingerprint evidence was withheld had not been presented to the state courts and therefore, federal relief was unwarranted. Thus, the Eighth Circuit has not carved out an exception to the exhaustion doctrine when a *Brady* claim is presented and that view is fully consistent with the views of the federal courts of appeals and this Court as well. *Duckworth v. Serrano*, 454 *U.S.* at 3 (exception to exhaustion made

only when there is no opportunity to seek redress in state court).

Moreover, the Third Circuit opinion is fully consistent with this Court's decision in *Vasquez v. Hillery*, 474 *U.S.* 254 (1986). In *Vasquez*, this Court noted that documents requested by the district court, in the form of affidavits about the black population of King County eligible for grand jury service during the accused's trial and memoranda on statistical probability analysis, did not present any claim upon which the state courts had not passed, *i.e.*, these claims were clearly exhausted in state court. The additional documentation requested did not undermine the policies of exhaustion. *Id.* at 258. As the Third Circuit noted here, however, *Vasquez* is inapposite because the substance of Landano's federal claim was never presented to the state court and, therefore, the rationale of *Vasquez*, which permits a federal court to request additional documentation on an exhausted claim, is simply inapplicable. (App. at 31-32).

Finally, in an attempt to disparage the Third Circuit's ruling, Landano claims that the court relied upon cases which "almost exclusively dealt with exhaustion cases involving involuntary confessions, incompetence of counsel, or improper trial statements by a prosecutor arising from facts fully known to the petitioner while he was in state court." Pet. at 24-25 n.1. However, the Third Circuit cited as supporting authority for its position *Wise v. Warden, Maryland Penitentiary*, 839 *F.*2d 1030 (4th Cir. 1988), which also involved a *Brady* claim. In *Wise*, the allegation was suppression of evidence of negotiations by the State with a codefendant, a claim that had been raised in four state post-conviction proceedings and two ha-

beas petitions. *Id.* at 1032. At an evidentiary hearing held in conjunction with his third habeas petition, Wise produced a document, obtained from codefendant's counsel, that set forth the terms of the agreement between codefendant and the State. The district court dismissed the petition, and the dismissal was affirmed by the Fourth Circuit on exhaustion grounds because the documentary evidence presented to the federal court "significantly alters the posture of [petitioner's] claim. The state court, which has never been presented with this critical evidence, must be given an opportunity to evaluate the claim in its new posture and to make relevant findings of fact to which the federal courts must in turn defer." *Id.* at 1034. Thus, it is clear that other federal courts of appeal have recognized that *Brady* claims are not immune from the exhaustion requirement and that new evidence presented at the federal level which alters the factual claim must first be presented to the state court for its review. Because no actual or implicit conflict exists in the circuits on this issue and because the decision below was consistent with this Court's interpretation of exhaustion, the petition for *certiorari* must be denied.

POINT II

THE THIRD CIRCUIT COURT OF APPEALS RIGHTLY REFUSED TO CREATE A THEORY OF "CONSTRUCTIVE WAIVER" OF THE EXHAUSTION DEFENSE BASED UPON ALLEGED IMPROPRIETIES BY A PROSECUTOR, WHICH WOULD DENY STATE COURTS THE INITIAL OPPORTUNITY TO REVIEW CLAIMS OF CONSTITUTIONAL ERROR.

As an alternative ground for issuance of the writ, Landano argues that if he did not exhaust his state

remedies it was due to the bad faith suppression of exculpatory evidence by the state prosecutors. He therefore argues that by its actions the State "constructively waived" the exhaustion defense. The Third Circuit Court of Appeals refused to adopt this rationale because it would deny state courts the initial opportunity to review claims of constitutional violations. This decision was totally consonant with the goals of the exhaustion doctrine and in no way violated Landano's constitutional rights.

First and foremost the State strongly disputes the contention that it has engaged in a bad faith suppression in this litigation. As a legal matter, the good or bad faith of the prosecutor is irrelevant in deciding whether there had been suppression of material evidence. *United States v. Agurs*, 427 *U.S.* 97, 110 (1976); *Brady v. Maryland*, 373 *U.S.* 83, 87 (1963). In any event, the claim of bad faith suppression is unsupported by the record. First, the state courts and the Third Circuit have determined that there was no suggestive procedure in Portas' identification of Landano. (Ja152-154; Ja166-169); *Landano v. Rafferty*, 856 *F.*2d 569, 571-572 (3d Cir. 1988), *cert.* den. 109 *S.Ct.* 1127 (1989). Second, the withholding of information about Roller's involvement in other crimes was based on constructive knowledge on the part of the prosecutor and, thus, a finding of bad faith is simply unwarranted. *Landano v. Rafferty*, 856 *F.*2d at 573. Similarly, no bad faith can be imputed by the prosecutor's failure to disclose an investigation of Jacob Roth's activities that yielded no evidence of impropriety. Finally, the State asserted below that the Kearny Police Continuation Report was provided to trial counsel and that the handwritten note contained

no exculpatory evidence. (App. at 30 n.16). Thus, the factual predicate for Landano's argument that exhaustion should not be permitted as a defense is lacking.

Moreover, Landano's legal argument that the State should not be permitted to raise the exhaustion defense because of this so-called "pattern of suppression" also is without authority. As the Third Circuit noted, this Court has never ruled, either explicitly or implicitly, that the exhaustion defense can be precluded if the federal claim involves suppression of evidence and in fact "just the opposite has been implied. . . ." (App. at 33). See, *e.g.*, *Duckworth v. Serrano*, 454 *U.S.* 1, 3 (1980) (exception to exhaustion doctrine made only if there is no opportunity to seek redress in state court). Moreover, other courts of appeals have applied the exhaustion bar to federal review even when the claim is suppression of evidence. See *Wise v. Warden, Maryland Penitentiary*, 839 *F.*2d 1030, 1033 (4th Cir. 1988); *Eaton v. Wyrick*, 528 *F.*2d 477, 481-482 (8th Cir. 1975). To adopt Landano's argument would establish different categories of constitutional violations with exhaustion applying to some claims but not to others. That hardly can further the purpose of the exhaustion doctrine, which is to reduce federal and state tensions by giving the state courts the first opportunity to examine alleged violations of federal constitutional rights. Moreover, such a rule would not further the goal of exhaustion which is to have all factual allegations necessary to resolution of the issue already resolved before federal involvement. If the federal court were required to hold evidentiary hearings to resolve factual issues, it would adjudicate the merits before deciding the ques-

tion of exhaustion. These were the reasons that the Third Circuit refused to accept Landano's "invitation" to carve out an exception to the exhaustion requirement when *Brady* claims are alleged. (App. at 33-34 and n.19). That court refused to assume, as apparently Landano does, that "state courts will be any less protective of the constitutional rights of criminal defendants than federal courts." (App. at 37, footnote omitted).

Contrary to Landano's allegation, *Granberry v. Greer*, 481 *U.S.* 129 (1987) supports the State's position. In *Granberry*, this Court determined that the State could *attempt* to waive the exhaustion defense but the federal courts have the final decision on the matter. "If, . . . the case presents an issue on which an unresolved question of *fact* or of state law might have an important bearing . . . " the federal court may insist on complete exhaustion and remand the matter to state court. *Id.* at 134-135 (emphasis added). Accord, *Keller v. Petsock*, 853 *F.*2d 1122, 1127 (3d Cir. 1988). Thus, the Court has recognized that exhaustion of state remedies is so important that even an attempt by the State to waive that defense may be rejected. That hardly indicates that this Court would look favorably upon an exception to the exhaustion doctrine where suppression of evidence is alleged and the State asserts the exhaustion defense.

In sum, the Third Circuit's refusal to fashion a rule of "constructive waiver" of the exhaustion defense when allegations of bad faith on the part of the prosecutor are made was consistent with the goals of the exhaustion doctrine. Therefore, the petition for *certiorari* should be denied.

POINT III[8]

PETITIONER'S ALLEGATION THAT THE TRIAL COURT'S SUPPLEMENTAL CHARGE ENTITLES HIM TO RELIEF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED. MOREOVER, THE TRIAL COURT'S INSTRUCTION DID NOT HAVE SUFFICIENT POTENTIAL FOR COERCION AND, THEREFORE, DOES NOT REQUIRE REVERSAL OF PETITIONER'S CONVICTION.

Petitioner asserts that he is entitled to habeas corpus relief due to the trial court's *Allen*[9] instruction to the jury. Respondents submit that petitioner fails to set forth a constitutional claim upon which habeas relief can be granted.

After several weeks of trial, the jury in this case began its deliberations. The jury deliberated one afternoon before it was sent home for the weekend. When the jury resumed deliberations on Monday, at least half the day was consumed with the readback of trial testimony. The next morning the trial court received a note from the jury foreman indicating that the jury was unable to reach a unanimous verdict.

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[8] Petitioner also raised this identical issue in his previous petition for *certiorari*, which was denied by this Court. *Landano v. Rafferty, et al.*, 109 *S.Ct.* 1127 (1989).

[9] The "*Allen*" charge, enunciated by this Court in *Allen v. United States*, 164 *U.S.* 492 (1896), is designed to induce a deadlocked jury to reach a verdict. It has been rejected by many jurisdictions as overly coercive, because it instructs the minority holdout jurors to reexamine their position, without putting the same demand on the majority jurors. *See State v. Czachor*, 82 *N.J.* 392, 398, 413 *A.*2d 593, 596 (1980). The charge given in this case, which was not a traditional *Allen* charge, is reprinted in its entirety in the Counter-Statement of the Case.

The trial court was confronted with a jury that over a two day period had deliberated approximately one day in a murder trial that had lasted several weeks. The trial court responded to the note by giving an supplemental charge to the jury. The court told the jury that it could not compel a verdict but pointed out "the importance and desirability of reaching a verdict in this case." Immediately following this statement, the court told the jurors that they should not reach a verdict unless they "as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions."

The court also told the jury that the oath they took "places upon each of you as individuals the responsibility of arriving at a true verdict upon the basis of your own opinion and not merely upon acquiescence in the conclusion of your fellow jurors." The court encouraged the jurors to be "open-minded" and to listen to and consider the opinions of the other jurors. The court did not focus on the minority jurors, but instead asked each juror to respect the opinion of the others and stated that "you should not hesitate to re-examine your own views in light of such discussion." Defense counsel did not object to this supplemental instruction. One hour later, the jury returned with its verdict.

Pursuant to 28 *U.S.C.* sec. 2254(a) a writ of habeas corpus may only be granted on the ground that an individual "is in custody in violation of the constitution or law or treaties of the United States." It is respectfully submitted that the trial court's supplemental instruction to the jury does not raise an issue of constitutional dimension.

This Court has continued to assert the validity of the *Allen* charge. *Lowenfield v. Phelps*, 484 *U.S.* 231, 237-238, reh. den. 485 *U.S.* 944 (1988). In order to determine whether a supplemental instruction is coercive, it must be considered "in its context and under all circumstances." *Lowenfield*, 484 *U.S.* at 237, quoting *Jenkins v. United States*, 380 *U.S.* 445, 446 (1965) (per curiam).[10]

The circumstances of this case indicate that the charge in question was not coercive. The supplemental instruction in this case is similar to the one given in *Lowenfield* in that "the charge given, in contrast to the so-called 'traditional *Allen* Charge,' does not speak specifically to the minority jurors." *Lowenfield*, 484 *U.S.* at 237-238. This case is also similar to *Lowenfield* in that the jury also returned with a verdict soon after receiving the supplemental instruction. Nevertheless, this Court found in *Lowenfield* that counsel's failure to object to the supplemental charge indicates that the potential for coercion now argued on appeal "was not apparent to one on the spot." *Lowenfield*, 484 *U.S.* at 240. Respondents contend that this reasoning is equally true in this case where defense counsel voiced no objection to the supplemental charge.

Respondents submit that given the length of this trial, the short period of deliberation, the absence of any polling of the jury, the lack of any objection to the supplemental charge by defense counsel, and the actual language of the supplemental instruction which

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[10] The ruling in *Jenkins* was based on this Court's supervisory powers over the federal court and not on constitutional grounds. *Lowenfield*, 484 *U.S.* at 239 n.2.

did not focus on the minority jurors, the potential for coercion in this case was nil. Thus, when the supplemental charge given by the trial court is considered "in its context and under all the circumstances" it is readily evident that the instruction was not "coercive" and did not deny petitioner any constitutional right. For these reasons, the petition for *certiorari* should be denied.

CONCLUSION

Based upon the foregoing, respondents urge that the petition for a writ of *certiorari* be denied by this Court.

Respectfully submitted,

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